

# Copyright Infringement, Trademark Infringement, and Social Media

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Over the last several years, people have been posting, uploading, and downloading files to and from the Internet with a vengeance. The threat of lawsuits does not stop them from doing so. In fact, either do most lawsuits. Courts in the United States has been quite permissive when it comes to copyright infringement lawsuits under the guise of “fair use.” Trademark infringement lawsuits have been unsuccessful, either under the First Amendment of the United States Constitution, “nominative fair use,” or under the “general” or “specific” knowledge test for contributory infringement. Trademark lawsuits have also been unsuccessful under the “non-commercial speech” exemption available to Internet gripe sites. Even lawsuits against a State for posting material on a State website have been unsuccessful, first under ineffective abrogation of Sovereign Immunity under Article I, and now, by saying that “copyright infringement” is not a “taking” because it is not “proportional” to the damage. An infringement of copyright does not deprive the owner of his use of the copyright, only a royalty ! Isn’t that a new reading of Sovereign Immunity ?

During the last year, courts have been backing down a little in trademark cases by saying that there *could* be liability for infringement if the website had “sufficient control” over the site. Also, courts have been making a distinction for posting unauthorized content on a website, noting the difference between just posting a photo from another site (infringement) and posting a photograph with some commentary to talk about the site from which it was taken, or to provide a timeline or context about the site to which it was posted (non-infringement). The law is confusing and contradictory.

This morning I will try to provide you with a history of the case law – and current cases, including U.S. Supreme Court cases – in copyright, trademark, and Sovereign Immunity to show you where the cases are going and the courts are headed. Many of the Supreme Court cases have been 5 -4 majority decisions. Can a content owner have any control over his copyrights and trademarks in the Internet and Social Media environment?

